

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Computer III Further Remand)
Proceedings: Bell Operating)
Company Provision of Enhanced)
Services)

CC Docket No. 95-20

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**REPLY COMMENTS OF
INFORMATION INDUSTRY ASSOCIATION**

Information Industry Association ("IIA"), by its counsel, hereby submits these reply comments in the above proceeding.¹ IIA has reviewed the comments in this proceeding and is gratified that a number of parties have highlighted the need for structural separation for the Bell Operating Companies ("BOCs") to provide enhanced services.

The comments from interested parties fall into predictable categories. The BOCs assert forcefully that local exchange competition exists today, that there is no potential for access discrimination and that structural separation is both costly and unnecessary. The enhanced service provider industry argues that the BOCs maintain a monopoly for local

¹ The Commission issued its Notice of Proposed Rulemaking in this proceeding, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket No. 95-20, *Notice of Proposed Rulemaking* (Feb. 21, 1995)(hereinafter "*Notice*"), in response to the Ninth Circuit's opinion in *California III. California v. FCC*, 39 F.3d 919 (9th Cir. 1994). Numerous parties filed comments on the *Notice* on April 7, 1995. In order to permit participants to more fully address the issues raised in the comments, the Commission extended the date for reply comments until May 19, 1995. *Order*, CC Docket No. 95-20, DA 95-908 (April 25, 1995).

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exchange service, that the monopoly perpetuates an incentive for anticompetitive behavior and that structural separation is the only way to create a level playing field and prevent actual discrimination. IIA encourages the Commission to undertake a thorough investigation of the evidence of real and potential discrimination arising from BOC provision of enhanced services. Based on the evidence already in the record, IIA submits that the Commission should conclude that structural separation is the only logical means of achieving fair and open competition for these services.

**MARKETPLACE REALITIES DO NOT SUPPORT
THE BOCS' ASSERTIONS**

The BOC contention that structural separation is not required is not supported by marketplace realities. As is demonstrated in the comments, local competition does not currently exist in most markets.² IIA acknowledges that competitive access providers (“CAPs”) do exist in a few select markets, however, CAPs have only limited services offerings that generally do not extend to the residential customers to whom most enhanced services are marketed. IIA member companies have found that even in markets where alternative facilities exist for directly accessing an interexchange carrier’s point of presence (“POP”), the monopoly local exchange provider remains the only means of carriage to the consumer’s home. Although IIA continues to anticipate that local competition will be a

² See e.g. *Comments of CompuServe Incorporated* at 17, n.39 which lists 39 states which restrict competition for local exchange services.

reality in the near future, that day is not yet here. Any Commission regulation based on a finding that local competition currently exists would be premature.

**ANTICOMPETITIVE BEHAVIOR REMAINS
A POTENTIAL THREAT TO ROBUST
DEVELOPMENT OF ENHANCED SERVICES**

The comments have raised important questions about the current existence and future threat of access discrimination from BOC provision of enhanced services. A number of commenters have provided the Commission with a “laundry list” of examples of anticompetitive behavior that the BOCs have engaged in to date.³ These examples include both cases of cross subsidization between regulated and unregulated activities and access discrimination that puts non-BOC enhanced service providers (“ESPs”) at a competitive disadvantage. Although there is no need to repeat the examples previously supplied to the Commission, the unambiguous message from the non-BOC comments cannot be overstated: nonstructural safeguards, even when supervised by the Commission, cannot ensure against anticompetitive activity. Nonstructural safeguards do not independently ensure an end to anticompetitive behavior. Given the Commission’s finite resources, there is only a limited ability to detect abuse. Even in the cases where abuse is detected, there rarely is an ability to adequately compensate the wronged party after the fact.

As long as the enhanced service providers are completely dependent on the BOCs to reach the ESP’s customers, as is the case today, the enhanced service provider will face

³ See e.g. *Comments of the Information Technology Association of America* at 43 et. seq.

the risk of being at an unacceptable competitive disadvantage. Structural separation is the only means available to the Commission to truly ensure that anticompetitive behavior on the part of the BOCs will be contained.

**THE COMMISSION SHOULD REIMPOSE
STRUCTURAL SEPARATION REQUIREMENTS
ON THE BELL OPERATING COMPANIES**

As IIA and other commenters have repeatedly emphasized to the Commission, structural separation requirements for Bell Operating Company provision of enhanced services is necessary in order to create a level playing field and to ensure fair and open competition. As the comments have demonstrated, nonstructural safeguards have not worked. Therefore, absent true marketplace competition, only structural separation can eliminate the risk of cost-sharing between regulated and unregulated activities and alleviate the possibility of intentional, or inadvertent, cost manipulation.

IIA is not swayed by the BOC arguments concerning the costs of returning to structural separation. The benefits to the marketplace and the public of creating a level playing field through use of structural separation more than outweigh any inefficiencies identified by the Bell Operation Companies.⁴ Moreover, the BOCs have been aware of the challenges to the Commission's nonstructural safeguard approach. The BOCs voluntarily

⁴ IIA does not agree that structural separation is less efficient. Other than the ability to use existing personnel for enhanced services, which assumes the BOCs currently have excess capacity, the BOCs have failed to demonstrate any efficiencies that would not flow from exploiting a position as the dominant force in the market.

assumed the risk of proceeding under unsettled regulations and should not somehow benefit from that unwise approach.

CONCLUSION

IIA appreciates the Commission's willingness to solicit industry comment on the full range of issues raised by the Ninth Circuit's decision in *California III*. The record in this proceeding already contains more than sufficient evidence of the problems associated with nonstructural safeguards for BOC provision of enhanced services. Only the imposition of clear structural separation will ensure that the Commission meets its goal and the industry's need for full and fair competition.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Albert Shuldiner", followed by a horizontal line extending to the right.

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